UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JAMES H. CUNNINGHAM, Petitioner, v. JOHN MARSHALL, Warden, Respondent.	Civil No. 07cv2183-DMS (RBB) **ORDER DENYING PETITIONER'S MOTIONS FOR APPOINTMENT OF LEGAL COUNSEL FOR THE INCOMPETENT [DOC. NOS. 10, 23]**

Petitioner James H. Cunningham, a state prisoner proceeding pro se and in forma pauperis, filed a Petition for Writ of Habeas Corpus [doc. no. 1] on November 13, 2007, and an Amended Petition [doc. no. 19] was filed nunc pro tunc to March 3, 2008. Cunningham also submitted a Motion for Legal Counsel for the Incompetent [doc. no. 10], filed nunc pro tunc to January 9, 2008. Petitioner claims he is currently suffering from a serious mental and emotional illness, for which he is prescribed medication, that renders him incompetent to litigate his Amended Petition. (Mot. for Legal Counsel 1, 4.) The Motion was accompanied by copies of his prison medical records. (See id. Attach.) The records show Cunningham has received psychiatric care in prison since 2005, and he was prescribed psychiatric medications intermittently for eight years before he was incarcerated. (Id. pt. 1, at 68-69.)[1]

The Court construed Petitioner's Motion as a request for a competency hearing and the appointment of a guardian ad litem. (See Order Requiring Additional Info. [doc. no. 15] 3.) After reviewing Petitioner's Motion and supporting medical records, the Court concluded that Cunningham had not produced substantial evidence of incompetence. The Court ordered Petitioner to submit any additional information, including declarations and exhibits, demonstrating he currently suffers from a mental illness that prevents him from litigating this case. (Id. at 6.) Specifically, the Court noted that it needed current medical records because the last record submitted to the Court was dated October 16, 2007. (Id.)

In accordance with the Order, Cunningham filed a supplemental Request for Appointment of Counsel for the Incompetent and Mentally Ill [doc. no. 23] on March 24, 2008. The supplemental document was accompanied by the same medical records that Cunningham previously submitted to the Court. Respondent did not file a response.

I. Petitioner Is Not Entitled to Appointed Counsel Under Rule 17(c) Because He Has Not Produced Substantial Evidence of Incompetence.

Pursuant to Federal Rule of Civil Procedure 17(c), the Court "shall appoint a guardian ad litem for an . . . incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the . . . incompetent person." Fed. R. Civ. P. 17(c); see R. Governing Habeas Corpus Cases 11 (stating that the rules of federal procedure apply in habeas cases to the extent they are not inconsistent with habeas corpus statutes or rules).

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[1] Cunningham's Motion for Legal Counsel [doc. no. 10] is lengthy, so it was split into four parts before it was electronically scanned and placed on the docket. The document is not consecutively paginated. Accordingly, the Court will cite to the Motion by first listing the part, then the page numbers supplied by the electronic case filing system. Petitioner's supplemental Request for Appointment of Counsel [doc. no. 23] and his Amended Petition [doc. no. 19] will be similarly cited.

In Allen v. Calderon, 408 F.3d 1150, 1154 (9th Cir. 2005), the Ninth Circuit held that "the district court abused its discretion in dismissing the petition for failure to prosecute without first holding a competency hearing or otherwise considering his claim." It explained that where a pro se petitioner submits "substantial evidence" of his incompetence, the district court should hold a competency hearing to determine whether the petitioner is "competent under an appropriate standard for habeas petitioners." Allen, 408 F.3d at 1153-54. Although the court did not specify what constitutes "substantial evidence" of incompetence or what is the "appropriate standard," it gave some guidance.

In Allen, the petitioner submitted his sworn declaration and a declaration from a fellow inmate which stated that Allen was mentally impaired and did not understand the court's orders. Id. at 1151. He also submitted a letter from a prison psychiatrist which stated that Allen was in the Enhanced Outpatient Program ("EOP") at the prison, had been "diagnosed with Chronic Undifferentiated Schizophrenia and [was] taking two psychotropic medications." Id. at 1151-52. Allen filed a second declaration in support of a motion for appointment of counsel in which he stated that he suffered from a "'debilitating mental illness that requires a course of treatment that includes the use of various psychotropic medications'" and that the mental illness combined with the medications "'severely [hinder] his ability to comprehend or correctly respond to the determinations and Orders made by the Court.'" Allen, 408 F.3d at 1152. The Ninth Circuit concluded that this was sufficient to require the district court to make a determination as to Allen's competency by appointing counsel and conducting a competency hearing. Allen, 408 F.3d at 1153-54.

Attached to Cunningham's original Motion are copies of his prison medical records. (See Mot. for Legal Counsel [doc. no. 10].) The records show that Petitioner has received psychiatric care since he was incarcerated in 2005. When he was evaluated on April 4, 2005, soon after he began serving his sentence, he reported to the psychiatrist that he had previously taken psychotropic medications intermittently for eight years. (Id. pt. 1, at 68-69.) He was diagnosed with a nonspecified mood disorder and prescribed Prozac and Remeron. (Id. at 69.) The doctor noted that his thinking was logical, and his IQ was within normal limits. (Id.)

Petitioner was seen by psychiatrists regularly thereafter. On May 18, 2005, his doctor added a prescription for Seroquel. (Id. at 66.) His prescription for Prozac was discontinued at some point, and he was prescribed the antidepressant Wellbutrin in July 2006. (Id. pt. 3, at 17.) He continued with this medication regimen and regular doctor visits throughout 2006. (See id. pt. 1, at 10-15.)

Cunningham was evaluated on January 17, 2007, for a renewal of his treatment plan. (Id. at 25.) He reported feeling depressed and paranoid and having some suicidal thoughts and difficulty sleeping. (Id. at 29.) Petitioner was diagnosed with a depressive disorder and a nonspecific psychotic disorder. (Id. at 29, 70.) Nevertheless, his thought processes and all areas of cognition were within normal limits, including intellectual functioning, concentration, attention, and memory. (Id. at 71.) His Global Assessment of Functioning ("GAF") was sixty-four. (Id. at 72.) A GAF between sixty-one and seventy "reflects mild symptoms or 'some difficulty'" in the areas of social or occupational functioning, "but the individual 'generally functions pretty well.'" Sims v. Barnhart, 309 F.3d 424, 427 (7th Cir. 2002) (quoting Am. Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders 30 (4th ed. 1994)). The doctor prescribed Seroquel for psychosis, Wellbutrin for depression, and Vistaril for insomnia. (Mot. for Legal Counsel, pt. 1, at 70.)

Cunningham continued with regular psychiatric visits throughout 2007. (See id. pt. 2, at 14-28.) On August 21, 2007, he was seen for a one-on-one psychiatric follow-up. (Id. pt. 2, at 16.) The doctor noted, "he has adjusted to program as well as school assignments, he is making high scores on tests/assignments." (Id.) At the next visit on Septmber 4, 2007, the doctor noted that Cunningham was "overall, more relaxed, less paranoid . . . ." (Id. at 15.) The doctor also indicated that Petitioner was taking his medications as prescribed. (Id.)

Cunningham returned to the doctor on October 16, 2007. (Id. at 14.) At this visit, he complained of depression and anxiety over "legal stuff." (Id.) He was informed that the California Department of Corrections was discontinuing the use of Wellbutrin on November 1, 2007, so he would have to be prescribed a different antidepressant medication. (Id.) Cunningham stated that he did not want a different antidepressant. (Id.)

The Court does not have any records after October 16, 2007, so it is unclear whether Petitioner is currently taking antidepressant medication, what his current mental state is, or whether he is currently suffering from anything that hinders his ability to represent himself in this case. Cunningham was due for another review and an update of his treatment plan on January 17, 2008. (Id. pt. 1, at 70.) Although the Court issued an order on February 21, 2008, directing Petitioner to submit current medical records, and a supplemental Request for Appointment of Counsel was filed on March 24, 2008, Cunningham has not provided any records after October 16, 2007.

The records submitted demonstrate that Petitioner suffers from depression and anxiety, and he has been regularly prescribed antidepressant medication while he has been in prison. Nevertheless, his doctors consistently indicated that his cognition and thought processes were within normal limits, he was focused and coherent, and he had only mild limitations in social functioning. (See, e.g., id. pt. 1, at 29, 32, 41-42, 70-72.)

There is no evidence that Cunningham has difficulty understanding or responding to the Court's orders. His medical records suggest the opposite. Because Petitioner has not presented substantial evidence of incompetence, his request for the appointment of counsel or a guardian ad litem based on Cunningham's mental condition is **DENIED** without prejudice.

II. Petitioner Is Not Entitled to Appointed Counsel.

In addition to asserting that he is mentally incompetent, Petitioner also contends that the interests of justice require that counsel be appointed to represent him because he lacks the necessary legal knowledge to represent himself. (Supplemental Req. for Counsel [doc. no. 23] 3-4.)

The Sixth Amendment right to counsel does not extend to federal habeas corpus actions by state prisoners. Coleman v. Thompson, 501 U.S. 722, 756-57 (1991); McCleskey v. Zant, 499 U.S. 467, 495 (1991); Chaney v. Lewis, 801 F.2d 1191, 1196 (9th Cir. 1986); Knaubert v. Goldsmith, 791 F.2d 722, 728 (9th Cir. 1986). Financially eligible habeas petitioners seeking relief pursuant to 28 U.S.C. § 2254 may obtain representation whenever "the court determines that the interests of justice so require." 18 U.S.C.A. § 3006A(a)(2)(B) (West Supp. 2007); Terrovona v. Kincheloe, 912 F.2d 1176, 1181 (9th Cir. 1990); Bashor v. Risley, 730 F.2d 1228, 1234 (9th Cir. 1984); Hoggard v. Purkett, 29 F.3d 469, 471 (8th Cir. 1994).

The interests of justice require appointment of counsel when counsel is "necessary for effective utilization of discovery procedures" and whenever the court conducts an evidentiary hearing on a petition. 28 U.S.C.A. Rs. 6(a), 8(c) foll. § 2254 (West 2006); see Knaubert, 791 F.2d at 728; Abdullah v. Norris, 18 F.3d 571, 573 (8th Cir. 1994). The appointment of counsel is otherwise discretionary. See Terrovona, 912 F.2d at 1177; Knaubert, 791 F.2d at 728; Abdullah, 18 F.3d at 573.

In the Ninth Circuit, "[i]ndigent state prisoners applying for habeas corpus relief are not entitled to appointed counsel unless the circumstances of a particular case indicate that appointed counsel is necessary to prevent due process violations." Chaney, 801 F.2d at 1196; see also Knaubert, 791 F.2d at 728-29. A due process violation may occur in the absence of counsel if the issues involved are too complex for the petitioner. Bonin v. Vasquez, 999 F.2d 425, 428-29 (9th Cir. 1993).

Cunningham asserts that he needs to be provided with appointed counsel because he has been unsuccessful at litigating his habeas petition as a layman who lacks legal knowledge. (Supplemental Req. for Counsel [doc. no. 23] 4.) After reviewing the pleadings, the Court finds that Petitioner has adequately presented his claims for relief in the Amended Petition, which was prepared with the assistance of another inmate. (See Am. Pet. pt. 2, at 70; Am. Pet. Ex. G, at 1-2.) The Amended Petition contains a recitation of relevant facts with citations to the applicable portions of the Reporter's Transcript for each claim. (See, e.g., Am. Pet. pt. 1, at 7-16.) Each claim also includes legal argument and citations to caselaw and other supporting authority. (See, e.g., id. pt. 1, at 17-18.) The level of detail and clarity of Cunningham's Amended Petition is sufficient for the Court to understand the claims being presented. This weighs against the appointment of counsel. See Bashor, 730 F.2d at 1234 (denying appointed counsel where petitioner thoroughly presented the issues in his petition and memorandum of law).

"The procedures employed by the federal courts are highly protective of a pro se petitioner's rights. The district court is required to construe a pro se petition more liberally than it would construe a petition drafted by counsel." Knaubert, 791 F.2d at 729 (citing Haines v. Kerner, 404 U.S. 519, 520 (1972) (holding pro se complaint to less stringent standard) (per curiam)); Bashor, 730 F.2d at 1234. The Court will review Cunningham's pro se Amended Petition more liberally than a petition drafted by counsel.

Additionally, "[t]he district court must scrutinize the state court record independently to determine whether the state court procedures and findings were sufficient." Knaubert, 791 F.2d at 729; Richmond v. Ricketts, 774 F.2d 957, 961 (9th Cir. 1985); Rhinehart v. Gunn, 598 F.2d 557, 558 (9th Cir. 1979) (per curiam); Turner v. Chavez, 586 F.2d 111, 112 (9th Cir. 1978) (per curiam). Even when the district court accepts a state court's factual findings, it must render an independent legal conclusion regarding the legality of a petitioner's incarceration. Miller v. Fenton, 474 U.S. 104, 112 (1985). The district court's legal conclusion, moreover, will receive de novo appellate review. Hayes v. Kincheloe, 784 F.2d 1434, 1436 (9th Cir. 1986).

The assistance counsel provides is valuable. "An attorney may narrow the issues and elicit relevant information from his or her client. An attorney may highlight the record and present to the court a reasoned analysis of the controlling law." Knaubert, 791 F.2d at 729. But, as the court in Knaubert noted, "unless an evidentiary hearing is held, an attorney's skill in developing and presenting new evidence is largely superfluous; the district court is entitled to rely on the state court record alone." Id. (citing Sumner v. Mata, 449 U.S. 539, 545-57 (1981); 28 U.S.C. § 2254(d)).[2]

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[2] If the Court determines that an evidentiary hearing is appropriate in this case, it may properly exercise its discretion to hold an evidentiary hearing, and counsel will be appointed. See Rule 8, 28 U.S.C. foll. § 2254.

Because this Court denies Petitioner's motion for appointment of counsel, it must "review the record and render an independent legal conclusion." Id. Moreover, because the Court does not appoint counsel, it must "inform itself of the relevant law. Therefore, the additional assistance provided by attorneys, while significant, is not compelling." Id.

For these reasons, the "interests of justice" in this matter do not compel the appointment of counsel at this stage of Cunningham's case. Accordingly, Petitioner's request for appointment of counsel is **DENIED** without prejudice.

IT IS SO ORDERED.

DATED: July 31, 2008

Ruben B. Brooks
United States Magistrate Judge

cc: Judge Sabraw
All parties